UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-11258-GAO

ROBERT D. HAPP,
Plaintiff

v.

CORNING INCORPORATED and CORNING NETOPTIX, INC.,
Defendants

MEMORANDUM AND ORDER
November 28, 2005

O'TOOLE, D.J.

The defendants Corning Incorporated and its subsidiary Corning NetOptix, Inc. (formerly Galileo Corporation and then NetOptix Corporation) have moved for summary judgment as to all claims asserted against them by the plaintiff Robert D. Happ, as well as to their counterclaim to recover money they[1] advanced to Happ for legal fees under an indemnification agreement. For the reasons that follow, I conclude that Corning's motion ought to be granted in all respects.

I. Background

Happ served as a director of Galileo/NetOptix from 1995 until the company's acquisition by Corning in 2000. In October 2000, the Securities and Exchange Commission ("SEC") brought a civil enforcement action against Happ, alleging that, as an "insider" of Galileo/NetOptix, he had impermissibly traded in the company's stock on the basis of material non-public information and thus had violated Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5. The SEC prevailed at trial, and the court entered judgment against Happ in the amount of $85,242.63, that sum

[1] For convenience, the two defendants are treated as a single interest, "Corning."

being comprised of a civil penalty in the amount of $34,758, a disgorgement order in an equal amount, and $15,726.63 in prejudgment interest. See SEC v. Happ, 295 F. Supp.2d 189 (D. Mass. 2003). The First Circuit affirmed. SEC v. Happ, 392 F.3d 12 (1st Cir. 2004).

As a director of Galileo/NetOptix, Happ was the beneficiary of an indemnification agreement pursuant to which the company agreed to indemnify him against the costs of defending an action such as that brought by the SEC, so long as he had acted in good faith and in a manner he reasonably believed was not contrary to the best interests of the company. (The indemnification agreement was effectively inherited by Corning by reason of the merger.) Under the agreement, however, Happ would be bound to repay any sums advanced to him if it should ultimately be determined that he was not entitled to indemnification.

At Happ's request, Corning advanced money to him under the indemnification agreement for his legal fees in the course of his defense of the SEC action. In July 2003, for reasons not directly pertinent here, Happ brought this suit, claiming that Corning was not fulfilling its obligation to make such advances. While this case was pending, the SEC case was resolved against Happ.

II. Corning's Counterclaim

Under the indemnification agreement, Corning was obliged to make advances for legal expenses if Happ provided Corning with an undertaking to repay the advances "if it shall ultimately be determined that Indemnitee is not entitled to be indemnified against such Expenses." Defs.' Mem in Supp. of Mot. for Summ. J., Ex A, Indemnity Agreement. In order to get Corning to make advances to him, Happ executed such an undertaking, which provided:

> If it is finally determined that, in violation of § 10(b) of the Securities Exchange Act of 1934 and/or § 17(a) of the Securities Act of 1933, I wrongfully used material non-public information of Galileo Corp. (later known as NetOptix and then Corning

> NetOptix) for personal gain, either with intent or recklessly, in selling shares of Galileo stock on or about June 29, 1998, which transaction is the subject of the action Securities & Exchange Commission v. Robert D. Happ, Civil Action No. 00 cv 12051-REK (D. Mass.), then I undertake promptly to repay Corning NetOptix for any and all costs of defense advanced by Corning NetOptix on my behalf. Such matter shall be deemed "finally determined" if an order or judgment is entered in the federal district court from which no appeal is taken, or upon the final resolution of appeals in the event an appeal is taken.

Id., Ex. B(A), Undertaking.

By the counterclaim, Corning asserts that because Happ was found in the SEC action to have violated the securities laws by insider trading, he is not entitled to indemnification and has the obligation pursuant to the undertaking to repay to Corning the advances made. The sum advanced is $878,877.92.

Happ argues that Corning is not entitled to repayment based upon the undertaking for three reasons. First, he says that the undertaking is invalid because it was procured by duress. Second, he contends that even if the undertaking is valid, the more general standard for indemnification set out in the indemnification agreement should govern, rather than the undertaking's standard that was specifically addressed to the SEC action, and that under the arguably broader standard, he is entitled to indemnification and therefore has no obligation to repay the advances. Third, Happ argues that even if the undertaking's language provides the governing standard for Corning's right to repayment, that standard has not been satisfied.

A. Duress

Happ does not dispute that the undertaking was negotiated over a period of months between his counsel and Corning's. Nonetheless, he contends that he was compelled under duress to agree to the particular form of undertaking, containing language that he asserts insufficiently protects his

right to indemnification under either the indemnification agreement or Delaware law (the applicable state law). Specifically, Happ claims that Corning, through its general counsel, effectively forced him to sign an undertaking he did not want to sign by refusing to make any advances until Corning had obtained the form of language it wanted, all while Happ's legal expenses in defending the SEC case were mounting. Happ argues that Corning operated from a superior bargaining position to deny him his right to full indemnification, which he apparently regards to include advances without the precondition of a case-specific undertaking such as that Corning insisted on. In realistic terms, Happ argues, there was no genuine negotiation of the undertaking language; it was essentially a "take it or leave it" offer from Corning. Happ also alleges that Corning wrongfully refused to give him a copy of the indemnification agreement while the negotiation was ongoing.

Under Massachusetts law,[2] a contract executed under duress – which may include economic duress – is not binding on the coerced party. See, e.g., Int'l Underwater Contractors v. New England Tel. and Tel. Co., 393 N.E.2d 968, 970 (Mass. App. Ct. 1979). A party seeking to avoid a contractual obligation on the basis of duress bears the burden of showing the conduct by the other party caused him to enter into the contract "under the influence of such fear as precludes him from

[2] The parties address the duress issue on the premise (which I accept) that Massachusetts law governs, although with respect to the right to indemnification itself, Happ relies in part on the Delaware corporation statute. Even if the law of Delaware should apply to the duress issue, that State's law does not appear to be substantially different from the law of Massachusetts on the issue of economic duress. See Vasello v. Haber Elec. Co., 435 A.2d 1046 (Del. Super. Ct. 1981), overruled on other grounds by, Pub. Water Supply Co. v. DiPasquale, 735 A.2d 378 (Del. 1999) (holding that duress requires a showing that unlawful threats or demands occurred and destroyed the victim's free will); see also Way Rd. Dev. Co. v. Snavely, C.A. No. 89C-DE-48, 1992 WL 19969,(Del. Super. Ct. Jan. 31, 1992) (duress requires a (1) wrongful act which (2) overcomes the will of a person, (3) who has no adequate legal remedy to protect their interests).

exercising free will and judgment." Coveney v. President & Tr. of Coll. of Holy Cross, 445 N.E.2d 136, 140 (Mass. 1983) (citation omitted). Hornbook law, adopted both in Massachusetts and in this Circuit, requires a party claiming economic duress to show that (1) he has been the victim of some unlawful or wrongful act or threat, (2) that the act or threat deprived him of his free or unfettered will, and (3) that as a direct result of the combination of these two factors, he was compelled to make a disproportionate exchange of values. See 28 Richard A. Lord, Williston on Contracts § 71:19 (4th ed. 2005); Int'l Underwater Contractors, 393 N.E.2d at 970 (citing Williston on Contracts); see also Ismert and Assocs. v. New England Mut. Life Ins. Co., 801 F.2d 536, 543-45, 548-49 (1st Cir. 1986). Economic duress does not exist where one contracting party simply takes advantage of another's financial difficulty or necessity. Rather, it exists only if the alleged wrongdoer's acts can be shown to have caused the financial difficulty that it then takes advantage of. See Int'l Underwater Contractors, 393 N.E.2d at 970.

Under these principles, to show duress Happ must first show that Corning committed a wrongful or unlawful act or threat. Corning's insistence that Happ execute an undertaking as a condition to the advance of legal fees cannot itself be viewed as wrongful, because the execution by Happ of such an undertaking was required by the indemnification agreement. The "wrong" in Happ's view was Corning's insistence on particular language for the undertaking, language which Happ contends limited his "right" to indemnification under the agreement, and by extension, under Delaware law.

Happ overinterprets the agreement. It authorizes indemnification so long as the indemnitee has acted in good faith and in a manner he reasonably believed was not opposed to the best interests of the company. Conversely, a potential indemnitee could be denied indemnification if he had not

acted in good faith, etc. Happ's theory appears to be that this provision established a "right" to indemnification in terms of a standard that could not be varied, even by mutual agreement, so that it became "wrongful" for Corning to insist on an undertaking that expressed the "right" in the specific context of an existing set of circumstances, viz. the SEC suit.

The general right to indemnification is set forth in paragraph 3 of the agreement. That is where the general standard Happ claims created his "right" is set forth. Paragraph 3 says nothing about when the indemnity is to be paid, and in particular says nothing about the opportunity for the indemnitee to obtain advances against an ultimately due sum. Advances are dealt with separately in paragraph 6. A simple mechanism is established. To obtain an advance, a putative indemnitee simply executes an undertaking that the advances will be repaid if it turns out that he is not entitled to them.

It is entirely natural to expect that an undertaking contemplated by paragraph 6 would refer to the particular occasion for indemnification that was at hand. If the contemplated undertaking were simply to parrot the general standard for indemnification, it would be entirely superfluous; the agreement could just as easily provide that in the event indemnification was not proper, the indemnitee would be bound to return any advances. One of the practical purposes served by an undertaking would be to contextualize the obligation to repay any advances with reference to real events currently at hand. That is what this undertaking did, and there is no reason to think that it somehow denigrated a broader "right" to indemnification simply by addressing specifically how the general standard would be applied in the specific case.

More importantly, Happ fails to establish the essential second proposition of the duress claim: that Corning's actions effectively overrode any freedom of choice on his part. Some form of undertaking was required. The parties proposed different drafts. Corning insisted on its draft. That

was hard bargaining, to be sure, but hard bargaining is not the same as coercion. The question is whether any rational trier of fact, properly instructed, could conclude that Happ's only possible choice was to sign the undertaking forced upon him. The evidence in the record would not permit such a conclusion. Here is how Happ himself described the impossible choice facing him: "I executed this undertaking because I felt I had no choice. I could not personally afford the kind of quality representation I needed without substantially undermining my family's financial health." Pl.'s Opp'n to Defs.' Mot. for Summ. J., Ex. 1, Happ. Aff. ¶ 16. No objective details are offered as to Happ's financial circumstances, so it is not possible to assess how much a risk there may have been to his family's financial health in the absence of Corning's advance of legal costs. Nor is any specific information offered which could be used to assess the implied assertion that there was no other way of financing the kind of defense of the SEC action that he deemed necessary. As noted, the law draws a distinction between a hard choice and no choice at all; only the latter serves to support a finding of duress. The evidence Happ offers is simply too general and too meager to permit a finding that he had no choice at all.[3]

To gild the lily, Happ fails the third part of the duress test as well. A finding of duress is proper only if Corning's coercion caused a disproportionate exchange of values. By signing the undertaking, Happ did not give up something of value in return for nothing. He gave up on his

[3] Happ also complains that, despite repeated requests from his lawyer, Corning never provided him with a copy of the indemnification agreement. If so, and it is assumed to be so for present purposes, it may have been a sign that Corning was playing uncooperative "hard-ball," but even if that could be said to have been "wrongful" in a pertinent sense, it is hard to see how withholding the agreement affected Happ's freedom of choice. Being able to invoke the precise language of the agreement in the negotiations over the undertaking may have given Happ an additional argument in favor of his proposed draft, or may even have affected his assessment of his negotiation strategy, but it would not at all have affected whether his free will was overridden.

version of the language of the undertaking in exchange for the obtaining the benefit he was seeking: Corning's advance payment of his legal expenses.

Happ argues that Corning had no right to demand an undertaking more specific in its terms than the general standard for indemnification set forth in paragraph 3 of the indemnification agreement, so that Corning was obliged to make advances if he provided only the general form of undertaking he was proposing. Consequently, Corning's recalcitrance in refusing to make advances on the basis of Happ's purportedly adequate undertaking – recalcitrance amounting in Happ's view (now, at least) to a breach of its contractual obligation – was a wrongful extraction of something of value to Corning, whereas Happ gained only what he already had a right to.

This was at best a disputable interpretation of the agreement, and it was in fact disputed by Corning. For the reasons discussed above, I do not construe the agreement as foreclosing Corning from requesting a case-specific undertaking. Be that as it may, faced with the disputed interpretation of the contract, Happ could have done what contracting parties often do when they believe another party is failing to abide by a contract obligation, and what he himself ultimately did when he later thought Corning was holding back advances he was due: he could have brought suit to enforce his contract right. There were good reasons why he might not choose to take that course, but that, of course, is the point. He made a choice. He preferred (a) accepting Corning's specific undertaking language and (b) promptly receiving advances to (c) seeking to enforce what he saw as his right to a more general undertaking (d) at the expense of delaying the commencement of the advances.

For all these reasons, the summary judgment record establishes that Happ's duress claim is not trial-worthy and provides no defense to the counterclaim.

B. The Indemnification Agreement Standard versus the Undertaking Standard

Happ's next argument is that even if the undertaking was not executed under duress, it must be read in conjunction with the indemnification agreement, the two forming in effect a single integrated agreement. His aim is to reinstate the general standard for indemnification expressed in the indemnification agreement itself, rather than the more specific standard of the undertaking.

The indemnification agreement provides that an indemnitee is entitled to indemnification "if he acted in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the Company." Defs.' Mem. in Supp. of Mot. for Summ. J. Ex. A., Indemnification Agreement ¶ 3. This standard is the same as the outer limits of indemnification provided under Delaware law, which grants a corporation the power to indemnify, if it chooses, and officer or director for expenses incurred defending suits or other actions brought based on the same standard. See Del. Code Ann. tit. 8, § 145(a).

Happ argues that under the broad indemnification standard of the agreement, as well as the similar Delaware statutory outer limit of permissible indemnification, a potential indemnitee is not necessarily to be denied indemnification simply because a third party action is determined against him. He argues that the more specific language of the undertaking in his case would, if given effect, impermissibly limit his right to indemnification. To cure what he sees as an unacceptable tension between the provisions, he proposes that the undertaking be read in conjunction with the indemnification agreement with the result that the broader standard of the indemnification agreement remains controlling. This is essentially a variation of his argument, considered and rejected above, that the language of the indemnification agreement created a "right" to a general standard, a right that would be violated by application of a more specific standard.

For this version of the argument, Happ must show why, under the standard canons of contract construction, the two agreements should be considered an integrated unity. Massachusetts courts have held that whether separate instruments should be viewed as one integrated agreement depends on an assessment of (a) the business context in which they were entered into, (b) the results intended to be accomplished, (c) the identity of the subject matter addressed in the agreements and (d) the timing of the execution of the two documents (i.e., whether they were more or less simultaneously executed or not, as an indicator of whether they were part of the same transaction or event). See Hackel v. FDIC, 858 F. Supp. 289, 291 (D. Mass. 1994); relying on Holmes Realty Trust v. Granite City Storage, 517 N.E.2d 502, 517 (Mass. App. Ct. 1988). While it is true that whether documents were intended by the parties to be integrated may require determination of contested facts by a fact-finder, in this case it is undisputed that the agreements were executed at very distinct points in time, the indemnification agreement in 1995 and the undertaking in 2001. It is also clear that the purpose of the undertaking was to specify what outcome of the then-ongoing SEC case would trigger Happ's obligation to repay money advanced by Corning. The undertaking was not intended to express the same standard as the indemnification agreement. The plain purpose of the undertaking was to make specific to the SEC case the general standard of the indemnification agreement.[4] Finally, Happ's contention that the general and specific provisions are not inherently inconsistent and can be read together harmoniously is belied by his own argument that the indemnification agreement provides a broader right to indemnification than the undertaking does.

[4] The indemnification agreement itself contemplates that it might be modified or amended by a writing signed by both parties "to reflect changes in Delaware law or for other reasons." Defs.' Mem. in Supp. of Mot. for Summ. J. Ex. A., Indemnification Agreement ¶ 16. Absent duress, the parties were free to supply a standard for the return of advances more specific (or more general, if they wished) than in the original indemnification agreement itself.

Therefore, the standard of the undertaking, not the general standard of the indemnification agreement, governs the resolution of this dispute.

C. Was the Undertaking's Standard Met?

Happ's final argument is that the undertaking's standard for triggering his duty to repay has not yet been met. Happ does not dispute that it has been (in the language of the undertaking) "finally determined that, in violation of § 10(b) of the Securities Exchange Act of 1934 and/or § 17(a) of the Securities Act of 1933, [Happ] wrongfully used material non-public information of Galileo Corp. (later known as NetOptix and then Corning NetOptix) for personal gain, either with intent or recklessly, in selling shares of Galileo stock on or about June 29, 1998, which transaction is the subject of the action Securities & Exchange Commission v. Robert D. Happ, Civil Action No. 00 cv 12051-REK (D. Mass.)."[5] Happ disputes, however, that the requirement of the undertaking has been met because it has not been finally determined that, again in the language of the undertaking, he acted "for personal gain, either with intent or recklessly." As to the latter part of the phrase, he cannot contest that the jury specifically found in answer to a special question that he had acted with intent, knowledge and recklessness. See SEC v. Happ, 295 F. Supp.2d at 200. Instead, he argues that there has not yet been a specific showing that he acted for "personal gain" because the jury never specifically found as much. The disgorgement penalty against him, he says, was only based upon a loss avoided, not a profit made, and thus should not be viewed as a determination that he acted for personal gain.

[5] According to the undertaking, a matter is "finally determined" when "an order or judgment is entered in the federal district court from which no appeal is taken, or upon the final resolution of appeals in the event an appeal is taken." As recounted above, Happ's appeal to the First Circuit was unsuccessful, and the SEC case has therefore been "finally determined" for purposes of the undertaking.

This is sophistry. It is clear on the record presented that in conducting the insider trading that was at issue in the SEC case, Happ acted for personal gain. The stock that Happ was found to have traded was his own, satisfying the "personal" part; the avoidance of a loss in value that would otherwise have been realized is a sufficient "gain."

D. Conclusion

Having concluded that the undertaking was not procured under duress, that the undertaking and not the indemnification agreement provided the proper standard by which to measure Happ's duty to repay Corning, and that the undertaking's conditions for repayment have been met, I conclude that Corning ought to be granted summary judgment on its counterclaim against Happ in the full amount of legal fees previously advanced.

III. Happ's Claims

I also conclude that Corning is entitled to summary judgment on all of claims brought by Happ.

Counts I and II are breach of contract claims alleging that Corning violated Happ's right to be advanced the costs of his legal defense under the indemnification agreement and the undertaking. Counts IV and V seek declaratory relief and injunctive relief ordering Corning to pay Happ's legal expenses. Corning is entitled to summary judgment on all of these counts for the same reasons that Happ is required to repay all legal fees advanced by Corning pursuant to the undertaking. There is no further controversy regarding the remaining withheld advances.

Count III alleges that Corning violated Mass. Gen. L. ch. 93A, §§ 2, 11 by not advancing Happ the legal fees he requested as he requested them, actions which Happ argues constitute unfair or deceptive business acts or practices by Corning. Corning is also entitled to summary judgment on

this count as well. The statute claimed under requires a dispute regarding a "commercial transaction between a person engaged in trade or commerce with another person engaged in trade or commerce" and not purely private transactions within one enterprise. See, e.g., Szalla v. Locke, 657 N.E.2d 1267, 1269-70 (Mass. 1995). Internal disputes that are intra-enterprise or between parties in the same venture do not fall within the scope of 93A. See, id.; cf., Manning v. Zuckerman, 444 N.E.2d 1262, 1265-66 (Mass. 1983).

IV. Conclusion

For the foregoing reasons, Corning's Motion for Summary Judgment is GRANTED. On its counterclaim, Corning shall recover from Happ the sum of $878,877.92. Judgment shall enter in favor of the defendants as to all claims against them.

It is SO ORDERED.

November 28, 2005
DATE

\s\ George A. O'Toole, Jr.
DISTRICT JUDGE